

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Removal of Return Receipt For
Merchandise Service From the
Mail Classification Schedule

Docket No. MC2015-8

PUBLIC REPRESENTATIVE COMMENTS

(January 9, 2020)

I. INTRODUCTION

Pursuant to Commission Order No. 5351, issued December 13, 2019, the Public Representative hereby responds to the Commission's request for comments on the Postal Service's renewed request to remove Return Receipt for Merchandise (RRM) service from the Mail Classification Schedule (MCS).¹ In its motion, the Postal Service requests that the Commission reopen Docket No. MC2015-8 and grant the Postal Service's request to remove this particular product from the MCS. *Id.*

II. BACKGROUND

In November 2014 the Postal Service requested pursuant to 39 U.S.C. § 3642 that it be permitted to discontinue the RRM product, an Ancillary Service within the Special Services class, and remove the product from the MCS.² As asserted by the Postal Service:

[RRM] service provides retail and commercial mailers with the ability to obtain a mailing receipt and a return receipt postcard (with the recipient's signature and date of delivery) for packages containing merchandise. However, [RRM] does not provide the purchaser with the ability to track the package online. Given the ability of alternative Ancillary Services that provide overlapping and improved features (including online tracking),

¹ Notice and Order Concerning the Removal of Return Receipt for Merchandise Service, December 13, 2019 (Order No. 5351).

² Docket No. MC2015-8, Request of the United States Postal Service to Remove Return Receipt for Merchandise Service From the Mail Classification Schedule, November 17, 2014 (Postal Service Request).

[RRM] service has become outmoded. As a result, [RRM] volumes and revenues have declined precipitously over the past few years.

Postal Service Request at 2-3. The Postal Service argued that “removing [RRM] service from the [MCS] would allow the Postal Service to simplify the Ancillary Services product by removing a redundant and outmoded product, and would improve customer satisfaction by requiring customers to adopt alternative services that provide overlapping and improved features (including online tracking).” *Id.* at 3.

The Commission found that the Postal Service’s request satisfied the requirements of section 3642 and its related regulations.³ However, the Commission also determined that the removal of RRM constituted a rate adjustment subject to the requirements of 39 U.S.C. § 3622 and its related regulations. *Id.* at 7-11. Because “the removal of RRM Service from the MCS would result in the deletion of its rate cell,” the Commission cited 39 CFR 3010.23(d)(2) as requiring that “[t]he Postal Service shall make reasonable adjustments to the billing determinants to account for the effects of classification changes such as the introduction, deletion, or redefinition of rate cells.” *Id.* at 8, 9.

Two potential alternative products to RRM were identified—Signature Confirmation; and Certified Mail (With Return Receipt). *Id.* at 3. Signature Confirmation was priced lower than RRM, but did not provide users with a physical return receipt postcard (because it provided proof of delivery and a copy of the recipient’s signature electronically). *Id.* Certified Mail (With Return Receipt) provided users with a physical return receipt postcard, but was priced higher than RRM.⁴ The Commission concluded that Certified Mail (With Return Receipt) was the only one of the two options “with ‘basic characteristics’ that closely mirror RRM Service’s basic characteristics[]”—*i.e.*, the physical mailing of a receipt postcard. *Id.* at 9. Thus, the Commission determined that

³ Docket No. MC2015-8, Order Conditionally Approving Removal of Return Receipt for Merchandise Service From Mail Classification Schedule, January 15, 2015, at 12-14 (Order No. 2322).

⁴ *Id.* It was on this basis that the Public Representative at the time maintained that “[t]he discontinuance of [RRM] service forces mailers who currently use the service to choose between higher prices or lesser service.” Docket No. MC2015-8, Public Representative Comments on Postal Service Request to Remove Return Receipt for Merchandise Service From the Mail Classification Schedule, December 11, 2015, at 2.

Certified Mail (With Return Receipt) was the applicable alternative product to be used for making adjustments to billing determinants associated with deletion of the RRM rate cell. *Id.* at 10-11. The Commission calculated the price cap implications of removing RRM on this basis, as a Type 1-A rate adjustment. *Id.* at 14.

In response to Order No. 2322, the Postal Service elected to indefinitely defer removal of RRM from the MCS.⁵ On February 18, 2015, the Postal Service appealed Order No. 2322 to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).⁶ In May 2015, the D.C. Circuit handed down a decision in a similar Commission case—Docket No. R2013-10—in which the Commission held that new mail preparation requirements implemented by the Postal Service constituted a redefinition of rate cells carrying price cap implications.⁷ After considering whether “the Commission is correct in its view that its rate cap authority extends beyond the regulation of posted rates to regulation of Postal Service operational rules that have ‘rate effects,’” the D.C. Circuit remanded the case to the Commission for purposes of articulating an intelligible standard as to when mail preparation changes constitute changes in rates. *Id.* at 743, 756.

Following this decision, the Postal Service and the Commission jointly moved the D.C. Circuit to remand the instant case to the Commission to determine whether the proposed removal of RRM constituted a change in rates under the standard that the Commission had been ordered to establish.⁸ The D.C. Circuit did so on June 15, 2015.⁹ In Order No. 3597, the Commission applied the new standard, which had been articulated in Order No. 3047, to the Postal Service’s RRM request. That standard provided that “a mail preparation change will be considered a classification change with rate effects under the price cap when the change results in the deletion and/or

⁵ Docket No. MC2015-8, Response of the United States Postal Service to Order No. 2322, January 28, 2015, at 2.

⁶ *United States Postal Service v. Postal Regulatory Comm’n*, No. 15-1037 (D.C. Cir. filed Feb. 18, 2015).

⁷ *United States Postal Service v. Postal Regulatory Comm’n*, 785 F.3d 740 (D.C. Cir. 2015).

⁸ Joint Motion to Remand Order of the Postal Regulatory Commission, No. 15-1037 (D.C. Cir. filed June 5, 2015).

⁹ Order, No. 15-1037 (D.C. Cir. filed June 15, 2015).

redefinition of a rate cell”¹⁰ “Deletion of a rate cell” was defined as “a change that causes the elimination of a previously-available rate cell or change that results in the functional equivalent of a deletion” *Id.* “Redefinition of a rate cell” was defined as “‘a significant change’ to a basic characteristic of a mailing” *Id.* The Commission held that “to determine the significance [of such a change], the Commission will assess the operational adjustment and/or costs required by the mailer to comply with the new mail preparation requirement.” *Id.*

Applying this new standard to RRM, the Commission held that the removal of RRM from the MCS would necessarily result in the deletion of the RRM rate cell. Order No. 3597 at 12. Thus, the Commission held that the Postal Service had to account for the rate effects of such a deletion pursuant to the price cap rules. *Id.* The Commission accordingly reaffirmed its decision from Order No. 2322. *Id.* at 13. The Postal Service again appealed to the D.C. Circuit.¹¹

In April 2018, the D.C. Circuit rejected the Commission’s revised standard from Order No. 3047.¹² That same day, the D.C. Circuit handed down a companion decision in the instant docket vacating Order Nos. 2322 and 3597 and holding that the Commission lacked the statutory authority to subject the wholesale discontinuance of RRM to the price cap.¹³ Considering the structure of the Postal Accountability and Enhancement Act (PAEA), the D.C. Circuit found that a dichotomy existed between the Commission’s duty to review additions to, deletions from, or shifts between product lists, as governed by section 3642, and the Commission’s separate authority to limit increases in rates for continuing products under the price cap, as governed by section 3622. RRM Vacature at 1268-69, 1270-71. As a result, “[t]he Commission lacks statutory authority to conduct overlapping review, subjecting discontinuation of a

¹⁰ Docket No. MC2015-8R, Order Resolving Issues on Remand, October 31, 2016, at 8 (Order No. 3597) (citing Docket No. R2013-10R, Order Resolving Issues on Remand, January 22, 2016 (Order No. 3047)).

¹¹ Petition for Review, No. 16-1412 (D.C. Cir. filed Nov. 30, 2016).

¹² *United States Postal Service v. Postal Regulatory Comm’n*, 886 F.3d 1253, 1255 (D.C. Cir. 2018).

¹³ *United States Postal Service v. Postal Regulatory Comm’n*, 886 F.3d 1261 (D.C. Cir. 2018) (RRM Vacature).

product to multi-factored review under Section 3642 and simultaneously treating it as a rate change under Section 3622.” *Id.* at 1273.

The Court concluded that “Congress provided review under Section 3642 as a sufficient and complete mechanism for the Commission’s consideration whether the lists of available postal products should be changed.” *Id.* at 1269. The Court stated that “Section 3642 lays out the processes and substantive considerations for managing the lists.” *Id.* Specifically, “[i]t requires broad, contextual consideration of the very market-power concerns that the Commission claims support its application of Section 3622’s inflation-based limit on rate changes.” *Id.* This is because “[r]eview under Section 3642 ensures that no product is discontinued unless doing so furthers the efficiency and innovation goals of the [PAEA], and requires the Commission to consider availability in the private sector and any impact on mailers and small businesses.” *Id.*

On August 29, 2019, the Commission entered an order closing Docket Nos. MC2015-8 and MC2015-8R.¹⁴ The Commission noted that it had been more than a year since the D.C. Circuit’s opinion vacating Order Nos. 2322 and 3597, yet the removal of RRM remained deferred and the Postal Service had not indicated any renewed intent to discontinue it. *Id.* at 3. On December 10, 2019, the Postal Service filed a renewed request to remove RRM from the MCS, as well as a motion to reopen Docket No. MC2015-8.¹⁵ According to the Postal Service:

There have been no material changes concerning RRM since 2015 that require revisiting Order No. 2322’s findings on the appropriateness of removal. RRM volume has flattened and continues to hover at FY 2014 levels, while online adoption has only increased, leading to further growth in Signature Confirmation. Additionally, free tracking . . . has expanded . . . to include a wide range of . . . products used by a multitude of customers. Free tracking has become so pervasive that the only service at present that incurs a fee when USPS Tracking is used is USPS Marketing Mail Parcels.

¹⁴ Docket Nos. MC2015-8 and MC2015-8R, Order Closing Dockets, August 29, 2019 (Order No. 5214).

¹⁵ Docket No. MC2015-8, Renewed Request of the United States Postal Service to Remove Return Receipt for Merchandise and Motion to Reopen Docket, December 10, 2019 (Postal Service Renewed Request). The Postal Service’s motion to reopen Docket No. MC2015-8 was granted by the Commission in Order No. 5351.

Postal Service Renewed Request at 3. Thus, the Postal Service asserts that “[w]ith the issue of price cap effects resolved . . . the Commission [should] reinstate its original finding that the removal of RRM comports with 39 U.S.C. § 3642 and 39 CFR 3020.30, *et seq.*” *Id.*

III. DISCUSSION

As a result of the D.C. Circuit’s ruling in the RRM Vacature decision, section 3622 cannot be applied to the Postal Service’s request to remove RRM from the MCS. Therefore, the relevant analysis must be restricted to section 3642. Pursuant to section 3642, a determination as to whether or not to allow a change in the Postal Service’s product lists shall be made in accordance with the following criteria:

(1) The market-dominant category of products shall consist of each product in the sale of which the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. The competitive category of products shall consist of all other products.

(2) Exclusion of products covered by postal monopoly.--A product covered by the postal monopoly shall not be subject to transfer under this section from the market-dominant category of mail. For purposes of the preceding sentence, the term “product covered by the postal monopoly” means any product the conveyance or transmission of which is reserved to the United States under section 1696 of title 18, subject to the same exception as set forth in the last sentence of section 409(e)(1).

(3) Additional considerations.--In making any decision under this section, due regard shall be given to--

(A) the availability and nature of enterprises in the private sector engaged in the delivery of the product involved;

(B) the views of those who use the product involved on the appropriateness of the proposed action; and

(C) the likely impact of the proposed action on small business concerns (within the meaning of section 3641(h)).

39 U.S.C. § 3642(b). In addition, the Commission's rules prescribe certain information that the Postal Service must provide when making a request to modify its product lists.

A. Paragraphs (1) and (2) of Section 3642(b)

At first glance, paragraphs (1) and (2) of section 3642(b) would appear to be primarily directed at transfers of products between the market dominant and competitive product lists, where a consideration of the Postal Service's market power is necessary to determining whether consumers of the product require the protection of the price cap due to a lack of effective competition in the market. The request at issue in the instant case involves removal of a market dominant product from the market dominant product list, which is somewhat different. Nevertheless, as the D.C. Circuit recognized, section 3642 "requires a broad, contextual consideration of . . . market-power concerns . . .," which "assimilates . . . concerns about abuse of monopoly power" RRM Vacature at 1269. The Court specifically noted that:

If the Postal Service had . . . proposed a product list change that would have materially harmed mailers or small businesses by, for example, abusing the Postal Service's market power through camouflaging a monopolistic rate increase as a product addition or deletion, the Commission would have been fully empowered—indeed, would have been required—under Section 3642 to reject that proposal.

RRM Vacature at 1269. The Commission followed this by stating in Order No. 5214 that when evaluating future requests to remove products from the MCS, it would seek to "understand[] the Postal Service's rationale for the discontinuation," and would "examine whether the request is a pretext for an abuse of market power." Order No. 5214 at 3.

In terms of its rationale for discontinuing RRM, the Postal Service asserted in its initial request that RRM has become outmoded; its volumes and revenues have declined; and removing RRM from the MCS would allow the Postal Service to simplify Ancillary Services by removing a redundant product and would improve

customer satisfaction by requiring customers to adopt alternative services that provide overlapping and improved services. Postal Service Request at 2-3. In its renewed request, the Postal Service asserts that RRM volume has remained flat, while alternative products and services such as Signature Confirmation and free tracking have experienced further growth and expansion. Postal Service Renewed Request at 3.

With regard to whether the Postal Service's request is a pretext for an abuse of market power, the Postal Service asserted in its initial request that there were two alternative services available to customers—Signature Confirmation and Certified Mail (Return Receipt Requested). Postal Service Request at 3. Signature Confirmation provided electronic evidence of mailing, but not physical evidence in the form of a postcard. *Id.* It was priced more cheaply than RRM. *Id.* Certified Mail (Return Receipt Requested) would have provided most RRM customers with a physical postcard evidencing receipt, but it cost more than RRM. *Id.* In terms of abuse of market power, the relevant question is whether removal of RRM service is intended to “camouflage a monopolistic rate increase.” RRM Vacature at 1269. This would be true if discontinuation of RRM was intended to drive customers to the more expensive alternative product—Certified Mail (Return Receipt Requested). Indeed, the Commission found in Order No. 2322 that Certified Mail (Return Receipt Requested) was the only comparable alternative to RRM, because only it provided users with a physical receipt. Order No. 2322 at 9.

However, the D.C. Circuit rejected this conclusion in its RRM Vacature decision. It found that the Commission “offer[ed] no evidentiary basis . . . [for concluding that] Certified Mail (With Return Receipt), rather than Signature Confirmation, [was] the choice mailers would make.” RRM Vacature at 1271-72. The Court noted that “[i]n fact, the great majority of mailers who previously purchased the RRM service have in recent years switched to the electronic Signature Confirmation option.” *Id.*

In its renewed request, the Postal Service asserts that since this docket was initiated, “online adoption has only increased, leading to further growth in Signature Confirmation.” Postal Service Renewed Request at 3. Furthermore, “free tracking . . . has expanded . . . to include a wide range of . . . products . . . , [such that] the only service at present that incurs a fee when USPS Tracking is used is USPS Marketing Mail Parcels.” *Id.*

It is no doubt true that there are some mailers who value physical evidence of receipt highly enough that they will avail themselves of the more expensive alternative—Certified Mail (With Return Receipt)—in order to receive it. For these mailers, discontinuation of RRM *is* effectively a rate increase. However, the fact that a minority of mailers strongly value this service does not mean that the Postal Service’s *intent* in discontinuing RRM is to camouflage a monopolistic rate increase on customers. The record suggests that the majority of former RRM customers are availing themselves of cheaper alternatives. Given this factual record, the Public Representative does not believe that sufficient evidence exists to establish that the discontinuation of RRM is a pretext for an abuse of market power.

B. Paragraph (3) of Section 3642

Under this paragraph, the Commission must consider: the availability and nature of enterprises in the private sector engaged in the delivery of the product involved; the views of those who use the product involved on the appropriateness of the proposed action; and the likely impact of the proposed action on small business concerns.

In its initial request, the Postal Service asserted that “[o]ther shipping services providers such as UPS and FedEx offer similar services to provide mailers with proof of mailing and evidence of delivery,” and “the Postal Service also offers alternatives . . . with equivalent or improved features.” Postal Service Request, Attachment B at 5. With regard to the views of RRM customers, the Postal Service asserted that they would “continue to have access to equivalent or improved features . . . ,” and that as a result “the Postal Service does not believe that customers will oppose the elimination of this service.” *Id.*, Attachment B at 6. The Postal Service

noted that it had not received any complaints, and that customers who migrated to Signature Confirmation would realize substantial savings. *Id.* With regard to small business concerns, the Postal Service asserted that removal of RRM was “not likely to have a material impact,” and that “[t]o the extent that the elimination of [RRM] service has forced some small businesses to migrate to Signature Confirmation or Certified Mail services, the Postal Service has not received any adverse feedback.” *Id.*

In Order No. 2322, the Commission concluded that these explanations were sufficient to meet the requirements of section 3642. Order No. 2322 at 12-13. In its renewed request the Postal Service maintains that there have been no material changes since 2015 that would affect the Commission’s conclusions on these matters. Postal Service Renewed Request at 3. Such being the case, there does not appear to be any reason for revisiting these issues.

C. 39 CFR 3020.30, *et seq.*

The Commission’s rules prescribe certain information that the Postal Service must provide whenever it requests to modify its product lists. Specifically, the Postal Service must:

- (a) Provide the name, and class if applicable, of each product that is the subject of the request;
- (b) Provide a copy of the Governor’s decision supporting the request, if any;
- (c) Indicate whether the request proposes to add a product to the market dominant list or the competitive list, remove a product from the market dominant list or the competitive list, or transfer a product from the market dominant list to the competitive list or from the competitive list to the market dominant list;
- (d) Indicate whether each product that is the subject of the request is:
 - (1) A special classification within the meaning of 39 U.S.C. 3622(c)(10) for market dominant products;
 - (2) A product not of general applicability within the meaning of 39 U.S.C. 3632(b)(3) for competitive products; or
 - (3) A non-postal product;

- (e) Provide all supporting justification upon which the Postal Service proposes to rely; and
- (f) Include a copy of the applicable sections of the Mail Classification Schedule and the proposed changes therein in legislative format.

39 CFR 3020.31.

With regard to the supporting justification required by 39 CFR 3010.31(e), the Commission's rules require that:

Supporting justification shall be in the form of a statement from one or more knowledgeable Postal Service official(s) who sponsors the request and attests to the accuracy of the information contained within the statement. The justification shall:

- (a) Demonstrate why the change is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code;
- (b) Explain why, as to market dominant products, the change is not inconsistent with each requirement of 39 U.S.C. 3622(d), and that it advances the objectives of 39 U.S.C. 3622(b), taking into account the factors of 39 U.S.C. 3622(c);
- (c) Explain why, as to competitive products, the addition, deletion, or transfer will not result in the violation of any of the standards of 39 U.S.C. 3633;
- (d) Verify that the change does not classify as competitive a product over which the Postal Service exercises sufficient market power that it can, without risk of losing a significant level of business to other firms offering similar products:
 - (1) Set the price of such product substantially above costs;
 - (2) Raise prices significantly;
 - (3) Decrease quality; or
 - (4) Decrease output
- (e) Explain whether or not each product that is the subject of the request is covered by the postal monopoly as reserved to the United States Postal Service under 18 U.S.C. 1696 subject to the exceptions set forth in 39 U.S.C. 601;
- (f) Provide a description of the availability and nature of enterprises in the private sector engaged in the delivery of the product;

- (g) Provide any information available on the views of those who use the product on the appropriateness of the proposed modification;
- (h) Provide a description of the likely impact of the proposed modification on small business concerns; and
- (i) Include such information and data, and such statements of reasons and bases, as are necessary and appropriate to fully inform the Commission of the nature, scope, significance, and impact of the proposed modification.

39 CFR 3020.32.

The Postal Service provided this information in Attachment B to its initial request. The Postal Service argued that:

Given that [RRM] mailers will be able to obtain equivalent and improved features using other services, the objectives in section 3622(b), such as maintaining “high quality service standards” and a “just and reasonable” schedule, shall continue to be met. Similarly, looking at the factors in section 3622(c), the availability of Signature Confirmation and Certified Mail services means that there will be “available alternative means” to receiving the same features provided by [RRM] “at reasonable costs.” Moreover, the removal of [RRM] from the Ancillary Services product will help ensure the “simplicity of structure” for mail classification.

Postal Service Request, Attachment B at 3-4. The Postal Service asserted that “[g]iven that [RRM] service is ancillary to the carriage of letters (or parcels that may contain letters), it does not fall within the scope of the postal monopoly.” *Id.* at 5. The Postal Service asserted that “[o]ther shipping service providers such as UPS and FedEx offer similar services designed to provide mailers with proof of mailing and evidence of delivery[,]” and “the Postal Service also offers alternatives . . . with equivalent or improved features.” *Id.* The Postal Service asserted that “[g]iven that current [RRM] customers will continue to have access to equivalent or improved features by using Signature Confirmation or Certified Mail services, the Postal Service does not believe that customers will oppose the elimination of this service[,]” and “the Postal Service has not received any complaints from customers that it has already migrated to Signature Confirmation service[,]” who “realize a substantial savings.” *Id.* at 6. The Postal Service asserted that “[t]he removal of [RRM] service from the Ancillary Services product is not likely to have a material impact on small business concerns[,]” and “[t]o the extent that

the elimination of [RRM] service has forced some small businesses to migrate to Signature Confirmation or Certified Mail services, the Postal Service has not received any adverse feedback.” *Id.*

In Order No. 2322, the Commission identified the significant objectives and factors implicated by the Postal Service’s request as being Factor 3 (the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters), and Factor 4 (the available alternative means of sending and receiving letters and other mail matter at reasonable costs). Order No. 2322 at 13 (citing 39 U.S.C. § 3622(c)(3), (c)(4)). The Commission concluded that “the Postal Service’s decision to remove a service with declining volumes and revenue outweighs the potential harm that current customers may face.” *Id.* In its renewed request the Postal Service maintains that there have been no material changes since 2015 that would affect the Commission’s conclusions on these matters. Postal Service Renewed Request at 3. Such being the case, there does not appear to be any reason for revisiting these issues.

IV. CONCLUSION

The Public Representative recommends that the Postal Service’s Renewed Request to Remove Return Receipt For Merchandise be granted. The Public Representative shares many of the Commission’s past concerns regarding the effect of RRM’s removal on those mailers who still value physical receipt of mailing. However, the D.C. Circuit has ruled that the Commission cannot apply section 3622 to the Postal Service’s request, and under section 3642 the Commission’s only options are to either approve or deny the request. The question, then, is whether discontinuation of RRM represents an abuse of market power sufficient to justify outright denial of the Postal Service’s request. Viewed in the totality, the Public Representative respectfully submits that it does not. Given evidence that the majority of former RRM mailers appear content to migrate to cheaper electronic services, the Public Representative believes that any potential harm to consumers due to RRM’s discontinuation will be minimal. The Public

Representative respectfully submits the foregoing comments for the Commission's consideration.

/s/
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